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STATE OF WASHINGTON
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No. 94559-4

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Plaintiff-Petitioner,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Defendant-Respondent.

PLAINTIFF-PETITIONER GILMORE'S ANSWER TO AMICUS BRIEFS FROM WASHINGTON STATE DEPT OF LABOR & INDUSTRIES, WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION, WASHINGTON STATE LABOR COUNCIL, INSURANCE AMICI, AND DOCTORS AMICI

David S. Heller, WSBA #12669
HELLER LAW FIRM, PLLC
860 SW 143rd Street
Seattle, WA 98166
(206) 243-7300

Sunshine Bradshaw, WSBA #40912
2006 Avenue D.
Scottsbluff, NE 69361-195
(308) 635-5000

Co-Attorneys for Plaintiff-Petitioner

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I. COLLATERAL SOURCE EVIDENCE WAS PROPERLY EXCLUDED.[1]

This evidence is barred by RCW 51.24.100 and the common law collateral source rule, and the trial court properly excluded it. Unfortunately, Division II erroneously held that excluding this evidence was an abuse of discretion. This Court could reverse Division II on this issue simply by holding that the trial court's decision was within its discretion. However, DLI, WSAJF, and WSLC have filed amicus briefs contending this Court should go further. Petitioner Michael Gilmore agrees with most but not all of their arguments.

The L&I third party process is intended to benefit the injured worker, regardless of whether the damages the worker seeks are those already covered by L&I. *See*, RCW 51.24.060(1)(b) (reserving to the injured worker at least 25% of the recovery regardless of the amount of DLI's interest); *Carrera v. Olmstead*, 189 Wn.2d 297, 299-300, 401 P.3d 304 (2017) (if DLI pursues third party case, it can recover *all* damages for the injured worker).

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[1]Petitioner is answering in this single document five Amicus Briefs: Department of Labor & Industries (DLI), Washington State Association for Justice Foundation (WSAJF), Washington State Labor Council (WSLC), the numerous insurance pools (Insurance Amici), and Drs. Chan and Freeman (Doctors Amici).

DLI urges this Court to hold, pursuant to the unequivocal language of RCW 51.24.100, that such evidence is **never** admissible, and that such common law exceptions to the collateral source rule as may exist should not apply in L&I third party cases.[2] Alternatively, DLI argues, without citation of authority, that if this Court holds that the L&I benefits door can be opened, it should limit that holding to cases where the injured worker is seeking general damages only.[3]

Petitioner agrees that, to the extent the common law collateral source rule ever allows "opening the door", RCW 51.24.100 precludes it in L&I third party cases. However, Petitioner disagrees with DLI that any valid reading of RCW 51.24.100 could result in holding the statute inapplicable to cases where only general damages are sought. The statute says no such thing. Rather, RCW 51.24.100 applies to "any third party action brought under this chapter".

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[2]Defendants in DLI third party cases already have remedies other than the violation of the statute and common law which defendant herein sought. If defendants truly believe that jurors are receiving an unfair picture of plaintiff's situation, they can object, move to strike, seek an instruction to disregard, or seek an immediate and/or a final specific substantive corrective instruction.

[3]DLI also already has remedies if third party plaintiffs do not pursue special damages; the Legislature anticipated this situation and authorized DLI to intervene in the tort suit if it believes its interests are not being adequately protected. RCW 51.24.030(2).

In addition, RCW 51.24.040 provides that injured workers **shall** receive full compensation and benefits "regardless of any election or recovery made under this chapter". Treating injured workers differently because they or their attorneys elected, for reasons of trial tactics, not to seek an itemized judgment for medical bills or lost wages in a third party tort suit would violate RCW 51.24.040.

DLI seems to join, albeit indirectly, in the defense's implication that Mr. Gilmore did something improper by not seeking recovery for his special damages in his tort case. DLI and defendant allege the Department will receive nothing if this Court reinstates the trial court judgment. While Petitioner appreciates this concession, *Jones v. City of Olympia*, 171 Wn. App. 614, 287 P.3d 687 (2012) may compel a different result for this type of undifferentiated third party proceeds. In any event, if there is a recovery herein, Petitioner expects the Department will be paid and also will benefit from a substantial "excess subject to offset".

WSLC also urges the Court to hold that L&I collateral source evidence is never admissible, except perhaps in extraordinary circumstances, because of the quagmire that admitting it creates. DLI at 12 called the situation created by introducing this evidence "a rabbit hole".

WSLC called it "unworkable". WSLC at 12. Admitting any collateral source risks letting the tortfeasor unjustly profit. *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 186, 131 P. 843 (1931). But this is particularly so with L&I because it is a uniquely complex collateral source. It pays some medical bills and partial lost wages and partial disability compensation, yet it never provides full compensation. "Benefits calculated in this manner by their very nature do not provide full compensation for the damages incurred." *Flanigan v. DLI,* 123 Wn.2d 418, 423, 869 P.2d 14 (1994).

Jurors might not understand this; if they knew what L&I had paid, they might incorrectly believe that was intended to fully compensate the injured worker, and might award little or nothing more. Jurors also might erroneously believe that all of their verdict would go to L&I, instead of an amount calculated via a complex formula. L&I reimbursement also has a unique feature, the "excess subject to offset". If L&I evidence were admitted, trial courts might be forced to explain all these items; otherwise jurors might get an inaccurate impression unfair to one side or the other.

WSLC cites *Terrell v. Hamilton*, 190 Wn. App. 489, 358 P.3d 453 (2015) in support of its argument that if, for some reason, the jurors do need to be told about L&I payments, it should be done via a narrowly

tailored, case-specific jury instruction. Petitioner agrees. This would at least allow the trial court to control precisely what information would be disclosed and how it would be used.

Admitting collateral source evidence also risks depriving plaintiffs of a full recovery due to juror misuse of the information.[4] WSAJF and DLI argue that for this reason, even without the statute, the L&I evidence was properly excluded pursuant to the common law rule of "strict exclusion", articulated in *Boeke v. International Paint Co.*, 27 Wn. App. 611, 617-18, 620 P.2d 103 (1980). Petitioner agrees. *Boeke* did not rely upon RCW 51.24.100, but upon the common law; it expressly considered three possible approaches to collateral source evidence: "[A] rule of strict exclusion, a rule of general admissibility, and a rule granting the trial judge discretion to admit the evidence in limited situations." *Id. Boeke* held that the rule of strict exclusion was "the better view". *Id. See also, Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (2000).

When we add to the policy of strict exclusion the additional barrier of RCW 51.24.100, it should be clear that this evidence is never, or almost

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[4] *See*, Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St.L.J. 158, 169 (1958): "But what evidence we have suggests that the jury does not like the [collateral source] rule. Their plaintiff sympathy does not extend to compensating the plaintiff for a loss which some other source has already made good."

never, admissible. Division II was simply wrong in finding that it was an *abuse of discretion* to exclude that which was not even admissible. If anything, it would have been an abuse of discretion to admit the evidence.

II. THE VERDICT WAS PROPERLY UPHELD BY THE TRIAL COURT.

Defendant made a CR 59 motion for new trial, alleging attorney misconduct in, *inter alia*, closing argument. The trial court exercised its discretion and denied the motion. Unfortunately, Division II erroneously held this was error. This Court should reverse Division II and hold that the trial court's decision was correct and within its discretion.

WSAJF at 19-20 cites authorities holding that "great deference" must be given to the trial court when it determines the effect of alleged misconduct upon the jury. Petitioner agrees. It is the trial court – not, with all respect, the appellate court – which best knows and can best place events into the entire context of the trial. "The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents." *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (footnotes omitted). The trial court herein not only saw and heard the entire trial, both on and off the record;

the trial judge lives in the county from which the jury was drawn, sees Jefferson County jurors every day, and knows far more about both the "typical" jurors there, and the specific jurors in this case, than any appellate court, however wise, could know.

Courts must consider the entire situation surrounding an argument and not take comments out of context. *State v. Smith*, 124 Wn. App. 417, 430, 102 P.3d 158 (2004). This contextual emphasis further reinforces the importance of trial court discretion in these matters. The trial court is in by far the best position to assess the totality of the circumstances, in the context of the entire record.[5] The trial judge's discretionary conclusion that there was no error <u>in the context of the entire record</u> should be upheld.

Insurance Amici repeat defendant's disingenuous statement at p. 5 of defendant's Response to Petition for Review, that a footnote in Mr. Gilmore's Petition for Review characterized plaintiff's closing argument as "technically incorrect". Petitioner made no such concession, as should be obvious from a fair reading of the words being misconstrued (emphasis added): "The lack of defense objection during plaintiff's closing argument

[5]For some of the context of plaintiff's closing argument, see references in fn. 10, *infra*.

further bolsters the trial court's discretionary conclusion that any technically improper argument was harmless." The footnote simply addressed the fact that defendant had failed to convince **the trial court** that the verdict was the result of any alleged impropriety.

Insurance Amici make two complaints about Petitioner's closing argument. They incorrectly accuse trial counsel of making a "golden rule" argument, and they allege that counsel did something that was somehow improper by calling defendant governmental entity "the government".

Insurance Amici do not cite any language from plaintiff's closing that constitutes a "golden rule" argument, because there is none. *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014) distinguished between an improper "golden rule" argument and a superficially similar but proper argument. Plaintiff's counsel in *Miller* told the jury it "reflects the 'conscience of the community' and serves as a protector and guardian for the community".[6] He also said: "But that's your decision. That's your values. That's what you get to decide, how we all are going to be treated equally, what that means." *Miller* at 816. This is not a "golden rule" argument:

> The vice of a golden rule argument is that it encourages the jury to 'depart from neutrality and to decide the case on the basis of

[6]Our courts are indeed the vehicle by which the conscience of the community finds expression. *See*, *Matter of Drinkwater's Estate*, 22 Wn. App. 26, 29, 587 P.2d 606 (1978).

> personal interest and bias rather than on the evidence.' [citations omitted]. [Plaintiff] did not appeal to juror self-interest; rather, he appealed to the jurors' interest as members of the public to 'protect the public interest'.

Id. at 817 (emphasis added). This type of "conscience of the community" argument is permissible, even when done by a prosecutor in a criminal case, unless done "with the specific intent to inflame the jury". *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999); *UW v. GEICO*, 74736-3-I (9/11/2017).

As in *Miller*, plaintiff's counsel here argued that the jury can serve as a protector of the community, and should consider the community's standard regarding damages. She also invoked an underlying purpose of tort law, protecting public safety by deterring negligence. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007). "And you know that if you don't hold the government accountable, that they will just keep doing what they're doing. That they will feel like they can run into anybody in this community and just walk away." RP 1032. Counsel also asked rhetorically "What's it worth in our community?" RP 1004, 1032. This was not a "golden rule" argument, and it was proper.

Moreover, neither defendant nor any amici have proved that the allegedly improper arguments affected the outcome. As *Miller* held at

817, the effect of a "golden rule" argument is "difficult to ascertain". Insurance Amici argue that no admonition or jury instruction could have cured the allegedly improper argument, but *Miller* holds that in fact a timely objection and a corrective instruction will remove any potential prejudice in most cases. *Id.* Here there was no objection. Had defendant objected, and had the trial court concluded the argument was improper in the context of the entire case, then the trial court would have sustained the objection and told the jury to disregard the argument, thereby eliminating any potential prejudice. Defendant instead did nothing, then or later, forgoing multiple opportunities to address the issue about which it now claims to be so concerned. *See*, Gilmore Supp. Brief, p. 6-7.

Insurance Amici argue that it is somehow unfairly prejudicial for counsel to refer to a governmental entity as "the government". This novel theory has no merit. They cite a survey from May of 2017 and an incident in Oregon in 2016[7] in which they say people accused of a crime were acquitted. It is disturbing indeed that representatives of governmental enti-

[7]Insurance Amici's articles contain multiple levels of hearsay, and Insurance Amici have made no effort to show that the survey was properly done, with properly neutral questions put to a properly chosen cross section of a properly-sized pool of Americans. Furthermore, there is no evidence that the subjects of this survey fairly represent typical Jefferson County jurors or the jurors on this particular case.

ties believe that an acquittal in a criminal case indicates a systemic problem. But in any event, the jury in this case returned its verdict on June 17, 2015, well before the cited occurrences. CP 401. A survey from 17 months after this verdict – and well after the 2016 national election – has no relevance to whether the jurors in this 2015 case had any alleged bias against the government. There is absolutely no evidence that they did.

Furthermore, calling the government "the government" is common and routine in American courts. The Washington Courts Juror Guide states: "Civil cases are disputes between private citizens, corporations, <u>governments, government agencies</u>, or other organizations." (emphasis added). *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972); Manual of Model Criminal Jury Instructions for the 9th Circuit 5.1 (2010); Manual of Model Civil Jury Instructions for the 9th Circuit 9.25A (2017); CrR 8.3(b) ("governmental misconduct"). It is unlikely that all these sources are trying to demean the government by calling it "the government".

Insurance Amici argue at 2-3, again without citation of authority, that calling the government "the government" also somehow violates that portion of RCW 4.96.010 which provides that local governments are liable for their torts "to the same extent as if they were a private person or cor-

poration." But this statute is not a shield for the government; on the contrary, it is a waiver of sovereign immunity. *Wilson v. City of Seattle*, 122 Wn.2d 814, 823, 863 P.2d 1336 (1993). It would be ironic indeed if this waiver were now used to protect governments from liability for their torts.

Defense trial counsel had no concern about anti-government bias among these jurors, either before or after plaintiff's argument, because the defense never requested WPI 1.07[8], or any other similar instruction. Indeed, given the small percentage of people summoned for jury duty who actually appear, common sense suggests that the people who do appear are, if anything, <u>more</u> likely than the average person to be civic-minded individuals who vote, pay their taxes, and support the government. Certainly this Court should not assume that jurors are inherently biased against the government.

While Petitioner does not know why the defense made the tactical decisions it made, one plausible theory is that defendant was quietly hoping for <u>pro</u>-government juror bias. This would explain why defendant made no effort to have the jurors instructed to treat everyone the same,

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[8]"The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner."

such as WPI 1.07, and why the defense spoke in closing about the government killing people. In any event, if juror bias against the government were a problem, defense counsel should have addressed it via a motion in limine, in voir dire, in a motion for change of venue, and/or sought jury instructions to neutralize it. The defense did none of these things.[9]

Insurance Amici cite *Warren v. Hart*, 71 Wn.2d 512, 514, 429 P.2d 873 (1967), but that case is inapposite. In *Warren* the trial court admitted evidence that no traffic citation had been issued, when substantial prior case law held this improper; and counsel compounded the error by arguing that the lack of citation meant the police had conducted their own "mini-trial" and the jury should follow their conclusion. Had plaintiff herein told the jurors that the bus driver received a ticket for the crash, and that that police decision bound the jurors, perhaps *Warren* would be applicable. Nothing like that happened here.

Petitioner's arguments simply responded to the arguments defense counsel promised to make and did make: Mr. Gilmore "was trying to commit a fraud. And I can prove it. And the jury needs to know about it." RP 50. Defendant repeatedly called Mr. Gilmore a fraud during the

[9]Potential jurors in this case who on voir dire did express bias against defendant were excused for cause. RP 104, RP 134.

trial, attacked his character, and even attacked the character of the witnesses he called.[10] Was Mr. Gilmore's counsel forbidden from responding to this defamation and character assassination? She chose to turn defendant's argument back against it by arguing that the real "attempted fraud" was the defendant's attempt to avoid paying its debt to Mr. Gilmore by mudslinging and character assassination.

Similarly, it was defense counsel's closing that raised the issue of the government killing people and trying to get away with it. Was plaintiff's counsel required to ignore this argument and waive rebuttal? Plaintiff's counsel did what she was supposed to do. She rebutted. She turned the argument back against defendant, using the language quoted above about the importance of holding accountable those who hurt others.

This is not improper. This is advocacy. And that is precisely what the trial court held: "This was a hard-fought case characterized by aggressive advocacy..." CP 723-24.

Evaluating a closing argument for impropriety is part of the trial court's job. Division II's decision here did what this Court rightly criticized in *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012): "the Court of

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[10] *See*, Respondent's Brief to Division II, pp. 3, 15-19; Petition for Review, p. 3 fn 1, pp.3-4; and Mr. Gilmore's Supplemental Brief, pp. 2-11, 18.

Appeals appears to have substituted its own judgment for that of the trial court." This was error, and this Court should reinforce the rule that trial courts are in by far the best position to accurately perceive these situations and to remedy them only if needed.

III. THE BIOMECHANICAL TESTIMONY WAS PROPERLY EXCLUDED.

Biomechanical engineers purport to calculate the forces an event inflicted upon a person, based on a handful of dissimilar experiments, and then purport to compare those forces to the forces of everyday life. The purpose is to improperly suggest to the jury, without explicitly saying so, that the "average" person would not have been hurt in this crash. But no individual is average – an average is a composite of multiple different individuals. The trial court properly excluded this inadmissible testimony. Unfortunately, Division II erroneously held that excluding this evidence was an abuse of discretion.

This Court could reverse Division II on this issue simply by holding that the trial court's decision was within its discretion. WSAJF at 8-11 and Doctors Amici make this argument. As WSAJF also correctly points out, the trial court should be affirmed if there is any basis in the record to do so. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). The

trial court record herein contains substantial evidence of flaws in Allan Tencer's methods, and none of this evidence was objected to. The trial judge stated that he had read these materials, RP 38-39; and the trial court's finding that the testimony would be "confusing" and "misleading to the jury" implicates ER 403 in substance, if not by name. These factors provide additional valid reasons to exclude this testimony.

Doctors Amici provide further argument and evidence which address that portion of ER 703 which requires that data upon which an expert bases an opinion must be reasonably relied upon. *See*, *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 215, 890 P.2d 469 (1995). It is not reasonable for an expert to rely upon dissimilar experiments when forming an opinion, and such opinions are inadmissible. *Sanchez v. Haddix*, 95 Wn.2d 593, 595-6, 627 P.2d 1312 (1981). Doctors Amici point out at pp. 4-5, and 9[11], that the biomechanical one-size-fits-all approach disregards factors whose consideration is required by both science and common sense, including the plaintiff's size, shape, and positioning, and the direction and location of the impact; that these witnesses extrapolate from too-small sample sizes, atypical test subjects, and tests designed not to cause injury

[11]The page numbers in our copy of the doctors' brief do not seem to align with their table of contents. Petitioner refers to the ordinal number of the actual pages of the brief.

to their test subjects. At pp. 11-13, Doctors Amici also correctly state that the scientific method requires a scientist to adjust any hypothesis to fit new data, and yet Tencer has not changed his forensic testimony over the years, despite his acquired knowledge of hundreds or thousands of cases where impacts he claims were minor in fact resulted in injuries.

Doctors Amici urge the Court to adopt the analysis in *Stedman v. Cooper,* 172 Wn. App. 9, 292 P.3d 764 (2012), which raises some of the same points Doctors Amici make in their brief. *Stedman* relied upon *Schultz v. Wells*, 13 P.3d 846, 852 (Colo. App. 2000). *Schultz* rejected the very centerpiece of biomechanical testimony, the alleged comparison of the crash to forces of daily living, holding: "Because of the lack of similarity between horizontal G-forces sustained during daily living activities and the numerous forces sustained during an unexpected rear-end automobile collision, evidence of the former would have been misleading." Doctors Amici at 6-8 also cite numerous cases from other jurisdictions that have precluded or severely limited similar biomechanical testimony, on scientific and/or legal grounds.

Doctors Amici also point out, at 9, that because of the "eggshell plaintiff" rule, knowing what forces are applied to a person – even if the

calculation were reliable and correct – is not helpful in determining whether a particular person was injured, because human beings vary so widely in their resistance to injury. How much force does it take to break the arm of plaintiff's appellate counsel? Seahawks quarterback Russell Wilson is the same height and weight as plaintiff's counsel, but counsel is confident it would take substantially more force to break Mr. Wilson's arm. But how much more? Petitioner also is confident it would take substantially less force to break the arm of a 95-year-old woman with osteoporosis. But how much less? The testimony of a biomechanical engineer who provides numbers for the forces involved in an event which allegedly caused a broken arm would be useless to the trier of fact unless the proponent of the evidence also provided competent, qualified medical testimony as to how much force it required to break that particular plaintiff's arm.

Petitioner agrees with these Amici's arguments. Petitioner also believes that biomechanical testimony often is being admitted or excluded according to "the length of the Chancellor's foot"[12] rather than on a true case by case basis. Even Tencer himself seems to believe this, because in

[12]The oldest reference Petitioner was able to find to this expression is John Selden, TABLE TALK 43 (1689).

his declaration he primarily lists judges who have admitted his testimony, rather than describing case facts where he has been admitted. CP 364-5.

This Court has Justices with scientific training, through NCSI (formerly known as ASTAR), plus other resources not available to many trial courts. The record in this case contains relevant scientific articles and other materials, CP 47-232. This Court has an amicus brief from scientifically trained experts who have articulated some of the flaws in biomechanical evidence. In light of all these factors, and based upon the extensive information available to this Court, Petitioner believes this Court could provide helpful additional guidance to our trial courts.

This Court could hold that such testimony simply is not admissible, because it is confusing and misleading, ER 403, it is based upon data not reasonably relied upon, ER 703, and it is not helpful to the jury in answering the questions it needs to answer, ER 702. *See*, *State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999) (testimony which passed *Frye* test still inadmissible as not helpful to the jury in answering the question it needed to answer).

Alternatively, this Court could provide guidance to the trial bench by setting forth the minimum foundational threshold necessary before trial

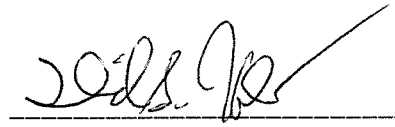
court discretion would be applied to determine whether such testimony should be admitted in a given case. The four-Justice concurrence in *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) may have presaged this outcome:

> I write to caution that our decision is not an endorsement of Tencer or the use of biomedical engineers in cases concerning soft tissue injuries caused by car accidents. Moreover, our decision in this case does not overrule *Stedman* ... or the sound analysis provided by [*Stedman*] on the question of whether such testimony is helpful....There is no "one size fits all" approach to collisions or injury threshold levels, or whether comparisons to daily activities are always relevant in a particular case.

Id., at 358. (J. Yu, concurring).

If a defendant were able to offer competent, qualified **medical** testimony with a valid foundation, establishing how much force it took to inflict the claimed injury upon the particular plaintiff, then perhaps scientifically valid calculations as to the force which an event exerted upon that plaintiff might be helpful to the trier of fact. In the absence of such medical evidence, biomechanical testimony is not helpful to the trier of fact and should be excluded.

DATED this 18th day of December, 2017.



David S. Heller, WSBA #12669
Attorney for Petitioner

Sunshine Bradshaw WSBA#40912
Attorney for Petitioner

HELLER LAW FIRM PLLC

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